

lit.

**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

DANA B. MOWER,)	
)	PCHB No. 91-209
Appellant,)	
)	
v.)	FINAL FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
STATE OF WASHINGTON,)	AND ORDER
DEPARTMENT OF ECOLOGY,)	
)	
Respondent.)	

This appeal of the Department of Ecology's (DOE) Enforcement Order No. 91-SH-169 dated August 27, 1991, came on for formal hearing before the Board on February 24 and 26, 1992, in Lacey, Washington.

Present for the Board were Board Members Annette S. McGee, Presiding, Harold S. Zimmerman, Chairman, and Administrative Law Judge John H. Buckwalter, legal advisor. Louise M. Becker, Court reporter, Gene Barker & Associates, Olympia, WA, recorded the proceedings on February 24, 1992. Randi A. Hamilton, Court Reporter, Gene Barker & Associates, recorded the proceedings on February 26, 1992.

Dana Mower represented himself, and Assistant Attorney General Charles W. Lean represented DOE. Mower appealed the Order on September 19, 1991, which became Pollution Control Hearings Board No. 91-209.

Opening statements were made, witnesses were sworn and testified, exhibits were admitted and examined. Closing written arguments were filed with the Board on March 6, 1992.

The Board has reviewed the record, and from the testimony, exhibits, arguments and memoranda, the Board makes the following Findings of Fact:

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**
PCHB No 91-209

I

Dana Mower owns or controls property in the Methow River Area of Okanogan County, Washington, specifically parcel number 980095-0015 in Section 9, Township 36 North, Range 19 East W.M. near river mile 71, near Mazama.

II

Mower applied to Okanogan County for a building permit to build a two-story single family residence with 1765 square feet on the first floor and 1376 square feet on the second floor. He paid the fee of \$591.50, and the County issued the permit dated July 12, 1990.

Mower proceeded to clear land on the site in preparation for building.

III

On August 23, 1990, the DOE notified Okanogan County Planning Director Mary Meloy by letter that they believed the project to be in a flood hazard area, the floodway of the Methow River, and that construction of a residence would be in violation of Chapter 86.16 RCW.

Okanogan County issued a stop work order on August 27, 1990, pending a resolution of the flood plain/floodway issue.

IV

Okanogan County re-issued the permit on August 21, 1991, based on the fact that the original permit was issued using what the County and applicant thought to be the "best available information at the time." This was the Federal Emergency Management Agency (FEMA) Flood Maps. It is uncontested that these FEMA Maps were later found to be inaccurate by the DOE.

Also, at this time, the County extended the expiration date on the permit to January 12, 1993.

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2 V

3 The DOE issued Order Number 91-SH-169 on August 27, 1991. It alleges that Dana
4 Mower violated the provisions of Chapter 86.16 RCW and ordered Mower to cease and desist
5 from all further construction activities within the horizontal limits of the flood plain of the
6 Methow River, including any areas of the designated flood plain or floodway of the Methow
7 River, whichever is greater. Mower was also ordered to submit a plan to the DOE to restore
8 the area that he had cleared, including where he had piled brush on the bank of the Methow
9 River.

10 VI

11 Because the FEMA maps were found to be inaccurate, FEMA made the decision to
12 contract with Northwest Hydraulic Consultants to do a restudy of this area, and as an interim
13 measure they did a "preliminary re-analysis of the area." They did not base the re-analysis on
14 new data, but simply re-ran its computer model with new assumptions, which were replacing
15 some of the input data. This showed a new 100-year flood elevation about five (5) feet above
16 the original one.

17 In a letter dated November 27, 1990, to Okanogan County Planning Director Mary
18 Meloy, from FEMA's Chief of the Natural Hazards Branch, Carl L. Cook, Jr., concerning the
19 completion of the preliminary re-analysis of the 100-year flood plain/floodway of the Methow
20 River, Cook stated . . . "In conclusion, we feel that the enclosed analysis produces a
21 floodway that is compliant with our standards, and elevations that reflect truer conditions.
22 Until we can initiate a comprehensive re-study that will involve new surveys, we recommend
23 using the enclosed data for flood plain management programs."

1
2 VII

3 Although the FEMA maps were found to be in error, Cook testified that the original
4 maps are still being used by FEMA to determine insurance rates in the Methow area. These
5 are the maps that were used by Mower and the County when the original permit was issued.

6 VIII

7 DOE's witness testified that in his opinion Mower's property lies within the floodway
8 and is subject to the 100-year flood plain hazard because of the nearness of the property to the
9 River, the fact that larger river rocks are deposited in the area, and there is no other obvious
10 place for flood waters to go. The building site is 50 to 100 feet from the River's main
11 channel.

12 IX

13 There was also testimony that the model used in the new preliminary analysis showed a
14 sharp drop in the river immediately below Mower's property, and that the model "blew up"
15 and was unable to converge, thus showing error messages for this cross section.

16 X

17 Federal standards for defining a floodway, "if you are up, you are out" support the
18 appellant. Okanogan County's policy is to require two (2) feet of elevation above the 100-
19 year flood plain boundary elevation.

20 The County's letter re-instating the building permit on August 21, 1991 states:

21 Upon a rough re-examination by FEMA of your property, it was
22 discovered that your building footprint sits substantially on the 100 year
23 flood plain boundary elevation. Our normal policy in these matters is to
24 require two feet of elevation above the 100 year flood plain boundary
25 elevation, but because you were issued a building permit based on the
26 best available information at the time, and you have acted in good faith
27 in pursuing your building since that time, this minimum compliance with
the statute will, in our estimation, be sufficient for us to allow you to

1 complete your building. Thus, the restrictions on your building permit
2 are removed as of the time of your receipt of this letter.

3 XI

4 Appellant Mower testified that the site in question is vertically out of the floodway,
5 based on information that he had received from the FEMA's contractor that is currently in the
6 process of restudying the area. It is also above the floodway based on the FEMA maps and
7 the FEMA preliminary re-analysis of the floodway.

8 XII

9 Okanogan County imposed a moratorium in August, 1991, on development in the
10 upper reach of the Methow River area in order to allow completion of an accurate flood hazard
11 analysis of the 100 year flood plain. This is the study presently being conducted. (See VI.)

12 XIII

13 It is uncontested that Mower and the County acted on the "best available information"
14 when they relied on FEMA maps in July, 1990, but the maps were flawed.

15 It is also uncontested that Mower acted on the "best available information" when he
16 relied on FEMA's Preliminary Analysis.

17 XIV

18 It is uncontested that due to the inaccurate FEMA maps, Ecology, FEMA and
19 Okanogan County have entered into contracts and grant agreements to re-study the area, which
20 will determine the floodway location of the Methow River.

21 The result of this study is predicted to be available by April 30, 1992, and could be
22 vital in the determination of public safety and welfare of the future construction in the Methow
23 River area.

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2 XV

3 Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.
4 From these Findings of Fact, the Board enters the following

5 CONCLUSIONS OF LAW

6 I

7 The Board has jurisdiction over the persons and subject matter of this appeal. RCW
8 43.21B.110(1)(b). Since this is an appeal of an agency order, the burden of proof is on the
9 Department of Ecology. In reaching its decisions the Board has considered the three issues
10 discussed below.

11
12 A. What Requirements Govern Regulation of the Methow Flood Plain?

13 II

14 The statutory basis for state and local flood plain management is found in RCW
15 86.16.051:

16 The basis for state and local flood plain management regulation shall be
17 the areas designated special flood hazard areas on the most recent maps
18 provided by the federal emergency management agency of the national
19 flood insurance program. Best available information shall be used if
these maps are not available or sufficient.

20 III

21 It is uncontested that the FEMA maps originally used by appellant and the County to
22 determine the location of his property are still the only FEMA maps in existence for that area
23 and that they are, in fact, still used by FEMA to determine flood insurance rates in the area.
24 It is argued by appellant that, according to these maps, his property lies approximately five
25 feet "up and out" of the 100 year flood plain.

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2 IV

3 The DOE does not contest that FEMA maps are "available" but does contend that the
4 maps have been determined by DOE, FEMA, and the County to be inaccurate and are,
5 therefore, not sufficient, and that a study is now ongoing to correct the inaccuracies, and that
6 other "best information" must be used for locating appellant's building site with regard to the
7 Methow flood plain.

8 V

9 We look to Chapter 173-158 WAC, FLOOD PLAIN MANAGEMENT, to determine
10 DOE's criteria for determination of what is the "best available information". As defined in
11 WAC 173-158-030(2):

12 (2) "Best available information" means in the absence of official flood
13 insurance rate map data, communities can use data from other federal,
14 state, or other sources provided this data has either been generated using
15 technically defensible methods or is based on reasonable historical
16 analysis and experience. (Emphasis added.)

17 (5) "Flood insurance rate map . . . " means the official map on which
18 the federal insurance administration has delineated both the areas of
19 special flood hazard and the risk premium zones applicable to the
20 community.

21 If these were the only two WAC sections relevant to determination criteria, the
22 conclusion would have to be that officially approved FEMA maps are both available and still
23 in use by FEMA, and that what otherwise might be considered the "best information" is
24 irrelevant.

25 VI

26 There is, however, another section to be considered, WAC 173-158-040:

27 The minimum regulatory area for state and local flood plain management
regulations shall be those areas subject to a base (one hundred year)
flood and designated as special flood hazard areas on the most recent
maps provided by . . . (FEMA) . . . Best available information shall be

used if these maps are not available
(FEMA). (Emphasis added.)

It is uncontested that FEMA considers its maps to be inaccurate, and the Board must conclude that they are therefore insufficient to provide the information necessary to determine the status of appellant's proposed building. The Board also concludes that this determination must be made from the "best information" available.

B. What Is the Best Information Available?

VII

The preliminary re-analysis issued by FEMA after its determination that its maps were inaccurate (Finding of Fact VI) was challenged in DOE's evidence as being inaccurate also, and much testimony was offered to advance DOE's position that appellant's property does indeed lie within the flood plain both horizontally and vertically.

While these technical and expert opinions may or may not be validated when a full restudy has been completed, the Board concludes that, under the statute and DOE's regulations, the "best" and controlling information available at this time is the FEMA re-analysis which has not been found "insufficient" by FEMA as required by WAC 173-158-040 (see Conclusion of Law VI above).

To the contrary, FEMA, in its November 27 1990 letter to the County Planning Director (Finding of Fact VI), endorsed the preliminary re-analysis as producing "a floodway that is compliant with our standards, and elevations that reflect truer conditions" and recommended "using the enclosed data for flood plain management programs."

VIII

It is true that RCW 86.16.031(8) authorizes DOE to "Establish minimum state requirements that exceed the minimum federal requirements for the National Flood Insurance Program," but only after certain requirements which are further defined by WAC 173-158-064

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

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2 have been fulfilled. While some of these requirements may already have been satisfied, there
3 is no evidence showing that all of them (including certain public notice/hearing requirements)
4 have been completed. The Board concludes that, lacking completion of all requirements, the
5 RCW and WAC noted above are not applicable at this time.

6
7 C. Does Appellant's Proposed Building Site Fall Outside the Flood Plain Limits Set by
8 FEMA's Re-analysis?

9 IX

10 Appellant contends that his building site is two or three inches above the re-analysis
11 flood level and, therefore, being "up" is also "out" of DOE's control. DOE's contention that
12 the re-analysis data is flawed has already been discussed and disposed of above. DOE also
13 presented testimony that a reliability factor must be considered and that the flood plain level
14 could be as much as five feet higher than that shown by the re-analysis and that appellant's
15 building site would then be within the flood plain level. But on cross-examination the witness
16 conceded that the reliability factor could also mean that the flood plain level could be five feet
17 lower than that shown by the re-analysis data in which case appellant's site would be above the
18 flood plain level.

19 X

20 In the absence of compelling rebuttal evidence, the Board concludes that appellant's
21 building site is above the flood plain level as determined from the FEMA re-analysis.

22
23 D. Should Public Safety Considerations Control the Board's Decision?

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2 XI

3 The policy for Washington State's Flood Plain Management is found in RCW
4 86.16.010:

5 The legislature finds that the alleviation of recurring flood damages to
6 public and private property and to the public health and safety is a matter
7 of public concern.

8 RCW 86.16.020 further provides that:

9 Statewide flood plain management regulation . . . shall be exercised over
10 the planning (and) construction (of) structures and improvements, public
11 and private, which might . . . adversely affect the security of life, health
12 and property against damage by flood water.

13 RCW 86.16.061 authorizes DOE to "adopt such rules as are necessary to implement
14 this chapter."

15 It is clear from the quoted statutes that, in summary, DOE has the authority and the
16 responsibility to adopt regulations, one of the purposes of which is to prevent to the fullest
17 possible extent the construction of buildings where life or safety, not only of the owners or
18 residents, but also of those service persons who most surely would become involved would
19 become threatened in case of a one hundred year flood.

20 XII

21 This Board cannot help but be concerned by the testimony it heard from DOE's
22 witnesses that, by their analysis, the site is unsafe because it lies within the actual flood plain
23 parameters, both horizontally and vertically.

24 XIII

25 The Board also, under other circumstances, might question the County's 1991 decision
26 to waive its requirement for buildings to be a minimum of two feet over the flood plain level
27 when it re-instated appellant's building permit and extended the time limit. However, this was
FINAL FINDINGS OF FACT,
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1 a discretionary action on the part of the County and that issue is not before the Board in this
2 appeal. The Board does conclude that the DOE regulatory actions and orders are authorized
3 by statute and WACs and are not dependent upon a county building permit, any conditions
4 thereon, or the county's reasons for issuance, legal or otherwise.
5

6 XIV

7 However, in spite of the safety concerns noted above, the Board must base its decision
8 upon the Statute, WACs, and evidence as they now stand.

9 SUMMARY AND CONCLUSION

10 XV

11 The Board concludes:

12 THAT the FEMA maps used to locate appellant's site in 1990 were inaccurate and
13 insufficient and are not the best evidence available for determining the status of appellant's
14 building site; and

15 THAT, because no newer study or maps have been completed, documented, accepted,
16 and implemented by FEMA, and because no greater requirements have been imposed on the
17 area as authorized by WAC 173-158-064, the best evidence available is the new FEMA
18 preliminary re-analysis of 1990; and,

19 THAT appellant's building site lies above the parameters in the FEMA 1990
20 preliminary studies and is not subject to the DOE's regulatory order.

21 XVI

22 While portions of the Board's analysis and conclusions may be relevant in similar
23 cases, its final Conclusions and Order are limited to the facts of this appeal and are not to be
24 interpreted as definitive for any other situations in the Methow flood plain or elsewhere where
25 the facts may vary.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
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1
2 XVII

3 The Board has found that statutory and regulatory requirements (which can be changed
4 only by legislative and/or DOE action) must prevail over possible, but unproven, safety
5 considerations. However, the Board concludes that any further purchaser of appellant's
6 property must be put on notice of its questionable status, which may or may not have been
7 resolved by a new study or maps by that time.

8 XVIII

9 Appellant's request for attorney fees and costs does not lie within the jurisdiction of
10 this Board.

11 XIX

12 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

13 From these Conclusions the Board enters this:
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ORDER

DOE's Enforcement Order No. 91-SH-169 is REVERSED subject to appellant's recording a copy of the Final Findings of Fact, Conclusions of Law and Order, PCHB No. 91-209, with other documents pertinent to his property in the Okanogan County's Auditor's Office.

DONE this 16th day of April, 1992.

POLLUTION CONTROL HEARINGS BOARD

Annette S. McGee
ANNETTE S. McGEE, Presiding

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

John H. Buckwalter
JOHN H. BUCKWALTER
Administrative Law Judge

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